No. 59

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

BOARD OF TRADE OF THE CITY OF CHICAGO,
Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

HAROLD E. SPENCER
RICHARD M. FREEMAN
One North LaSalle Street
Chicago 2, Illinois
Counsel for Board of Trade of the City of Chicago, Appellant

J. S. CHARTRAND
141 West Jackson Blvd.
Chicago 4, Illinois

BELNAP, SPENCER, HARDY & FREEMAN
One North LaSalle Street
Chicago 2, Illinois
Of Counsel

McCORMICK & HENDERSON INC., CHICAGO, ILL.

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JURISDICTIONAL STATEMENT

Appellant, Board of Trade of the City of Chicago (Board of Trade), an intervening plaintiff in the court below, submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that the question presented by the appeal is substantial and is of public importance. A separate appeal from the same judgment below is being taken by the plaintiff below, A. L. Mechling Barge Lines Inc. (Mechling) and various grain elevator operators who were also plaintiffs in the court below.

OPINIONS BELOW

The opinion of the three-judge United States District Court for the Northern District of Illinois, Eastern Division, filed September 18, 1962, is reported at 209 F. Supp. 744. A copy of the opinion is attached hereto as Appendix A. A copy of the District Court's judgment dismissing the complaint is attached as Appendix B. The report of the Interstate Commerce Commission, the validity of whose order is at issue in this case, is reported at 310 I.C.C. 437. A copy of said report is attached hereto as Appendix C. A copy of the Commission's Fourth Section Order No. 19346, entered June 8, 1960, is attached as Appendix D.

JURISDICTION

This is an action, commenced by Mechling pursuant to the provisions of 28 U.S.C. §§ 1336, 1398, 2284 and 2321-2325, inclusive, and 5 U.S.C. § 1009, to enjoin, set aside, annul and suspend a report and order of the Interstate Commerce Commission in Fourth Section Application No. 33955, *Corn and Corn Products, Illinois to Official Territory*. The Board of Trade was permitted to intervene as a party plaintiff, and to file its intervening complaint, on November 30, 1961. The judgment of the District Court dismissing the complaint was filed September 18, 1962. Notice of appeal was filed by the Board of Trade in the United States District Court for the Northern District of Illinois on November 16, 1962.

Jurisdiction of the Supreme Court to review the judgment of the three-judge District Court by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). Such jurisdiction is sustained by a large number of cases, including *United States* v. *Merchants & M. Traffic Asso.*, 242 U.S.

178 (1916); *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557 (1919); *Interstate Commerce Com.* v. *Mechling*, 330 U.S. 567 (1947); *Dixie Carriers* v. *United States*, 351 U.S. 56 (1956); and *Mechling Barge Lines* v. *United States*, 368 U.S. 325 (1962).

STATUTES INVOLVED

This appeal involves the national transportation policy, note preceding 49 U.S.C. § 1, and sections 3(1), 4(1), and 13(1) of the Interstate Commerce Act, 49 U.S.C. §§ 3(1), 4(1), and 13(1). The text of those provisions is set forth in Appendix E hereto.

QUESTION PRESENTED

May the Interstate Commerce Commission, over the protest of affected shippers and localities, authorize rail carriers to maintain rates which depart from the long-and-short-haul requirement of section 4 of the Interstate Commerce Act, without considering and determining whether such fourth-section-departure rates would violate section 3(1) of the Act by causing undue prejudice against such shippers and localities?

STATEMENT OF THE CASE

This case involves the validity of an order of the Interstate Commerce Commission authorizing railroads to depart from the long-and-short-haul requirement of section 4 of the Interstate Commerce Act in order to maintain rates on corn products to the East from origins on that part of the Kankakee Belt line of the New York Central Railroad Company (NYC), which extends westward from Kankakee, Ill., to Moronts, Ill., a point near the Illinois River, a distance of approximately 83 miles, such rates being lower than the rates from points east thereof.

The basic issue raised by this appeal is whether the Commission may authorize such fourth-section departures without considering evidence submitted by the Board of Trade to show that the proposed rates would unduly prejudice Chicago grain interests in violation of section 3(1) of the Act. The Commission held that it could, saying (310 I.C.C. at 451) that the issues concerning discrimination raised by the Board of Trade "do not directly deal with the fourth-section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings."[1] The Board of Trade contends that the Commission erred in so holding and that, before it may authorize fourth-section-departure rates, the Commission is required to consider, and make proper findings upon, the evidence submitted by the Board of Trade

[1] The statement of the District Court (Appendix A, p. 3a) that the Board of Trade claims error on the part of the Commission in refusing to admit evidence of discrimination and prejudice against Chicago is incorrect. The evidence was not excluded. What the Board of Trade claims is that the Commission was required to consider, before it could grant relief under section 4, whether the evidence which was admitted showed that the proposed rates would cause undue prejudice to Chicago grain interests in violation of section 3(1).

to show that the proposed rates would unduly prejudice Chicago grain interests in violation of section 3(1) of the Act.

The rates involved are illustrated by the three charts which appear on page 6 hereof, showing the rate situation from Streator, Ill., a representative point on the Kankakee Belt line, to New York, N.Y., a representative destination in the East.

As shown by Chart I, prior to December 15, 1956, there were in effect from Streator to New York, applicable via either Chicago or Kankakee, a one-factor rate on corn of 72 cents and a one-factor rate on corn products of 72.5 cents.[2]

As shown by Chart II, the underlying basis for the one-factor rates from Streator to New York via both Chicago and Kankakee was the Chicago combination composed of a local inbound rate of 23 cents to Chicago and a proportional rate from Chicago to New York. At that date, the proportional rate on corn was 49 cents and the proportional rate on corn products was 49.5 cents.

Both the one-factor rates and the Chicago combinations carried storage-in-transit and milling-in-transit privileges. As a matter of the technical application of the rates, whenever a one-factor rate was published over a particular route, it applied to the exclusion of any combination of rates. If there was no one-factor rate published over a particular route, however, then the applicable through rate was the Chicago combination. Some shippers were dependent on the one-factor rates; others were dependent on

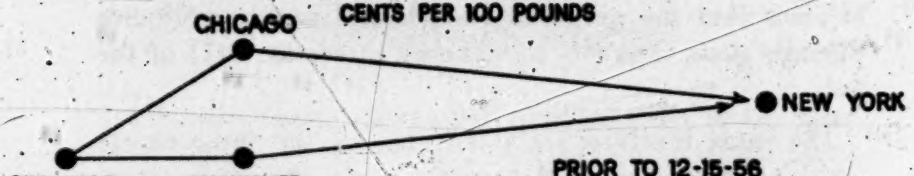
[2] Unless otherwise indicated, all rates and differences are stated in cents per 100 pounds. There have been general increases in the various rates since December 15, 1956, but this does not change the competitive situation involved.

STREATOR, ILL. TO NEW YORK, N.Y. CHART I

PRIOR TO 12-15-56

One-Factor through rates on Corn and Corn Products

CENTS PER 100 POUNDS



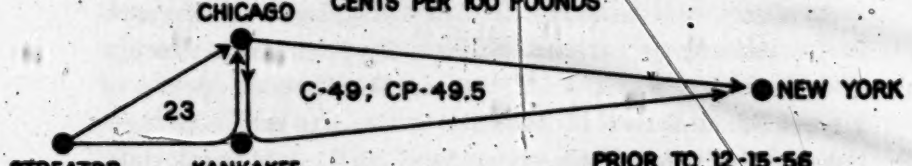
	PRIOR TO 12-15-56 CORN	PRODUCTS
One-Factor through rates		
Via Chicago	72	72.5
Via Kankakee	72	72.5

STREATOR, ILL. TO NEW YORK, N.Y. CHART II

PRIOR TO 12-15-56

One-Factor through rates were equal to Chicago Combinations

CENTS PER 100 POUNDS



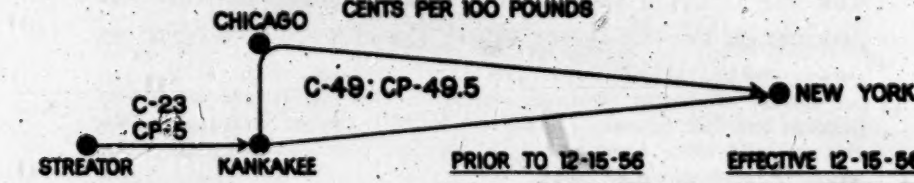
	PRIOR TO 12-15-56 CORN	PRODUCTS
One-Factor through rates		
Via Chicago	72	72.5
Via Kankakee	72	72.5
Chicago Combinations	72	72.5

STREATOR, ILL. TO NEW YORK, N.Y. CHART III

EFFECTIVE 12-15-56

New Kankakee combinations on Corn Products only when milled in transit

CENTS PER 100 POUNDS



	PRIOR TO 12-15-56 CORN	PRODUCTS	EFFECTIVE 12-15-56 CORN	PRODUCTS
One-Factor through rates				
Via Chicago	72	72.5	72	NONE
Via Kankakee	72	72.5	72	NONE
Chicago Combinations	72	72.5	72	72.5
New Kankakee Combinations	-	-	72	54.5

the Chicago combinations; but all were on a competitive equality because, as Chart II shows, the one-factor rates were exactly equal to the corresponding Chicago combinations.

The impact of the rates here involved upon the rate structure is illustrated by Chart III. Effective December 15, 1956, the NYC published a blanket rate of 5 cents[3] on corn from the involved stations on the Kankakee Belt line to Kankakee, applicable, however, only on traffic reshipped from Kankakee to the East and applicable only when the corn is milled-in-transit into corn products at Kankakee or some other point short of its final destination. The effect of this milling-in-transit requirement is to make the new low Kankakee combination rate applicable exclusively on corn products.[4] At the same time, the railroads made the one-factor rates inapplicable via Kankakee, leaving only the new, drastically reduced, Kankakee combinations to apply. To New York from Streator, this resulted in a Kankakee combination of 54.5 cents on corn products, as shown by Chart III. The rate on corn remained unchanged at 72 cents, since the 5-cent inbound rate could not be used on shipments of whole corn. The announced purpose of these changes was to meet barge competition on the Illinois Waterway to Chicago, but the NYC, however, refused to make the 5-cent rate applicable to Chicago, the barge-unloading point, where it could have been combined with the Chicago proportionals, making the Chicago combinations equal to the new Kankakee combina-

[3] By reason of subsequent general increases in the rates, this has become 6 cents at the present time, and is referred to as such in the opinion of the District Court.

[4] The mechanics of handling the shipment are that the 23-cent rate on corn is paid when the corn moves to Kankakee and the difference between the 23 cents and 5 cents is credited by the carrier against the outbound movement of corn products from the milling point.

tions. Thus, rates which historically had been made equal to the Chicago combination were changed to reflect a Kankakee combination.

These changes seriously injured Chicago grain interests in two principal ways. First, for all practical purposes, they prevented Chicago grain merchants and elevator operators from buying whole corn off the Kankakee Belt line, from which several hundred cars a year move. When corn is bought in Chicago or Kankakee, the inbound freight charges are deducted from the invoice price and are borne by the country shipper. But, on and after December 15, 1956, the processors at Kankakee and east thereof could take advantage of the new rates, knowing that, when the corn was processed and shipped out as corn products, they would secure a credit for the difference between the 23-cent rate and the 5-cent rate. They were thus in a position to offer 18 cents per 100 pounds (approximately 10 cents per bushel) more for the corn than could the Chicago grain dealers and elevator operators. Of course, they did not actually have to offer anything like that amount to control all the corn since a fraction of a cent per bushel is enough to accomplish such a purpose. The Chicago grain dealers and elevator operators, who supply whole corn to many different types of customers at a wide variety of locations, could not buy any substantial quantity of corn off the Kankakee Belt in competition with processors routing their traffic through the Kankakee gateway, resulting in undue prejudice to the Chicago merchants. The Commission did not deal with this problem at all in its report.[5]

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[5] In an attempt to appease the Chicago interests, an official of the NYC, testifying in this case on January 29, 1958, promised that the NYC would take immediate steps to remove the discrimination against whole corn by removing the milling-in-transit limitation. This promise was referred to by the Commission in its report (310 I.C.C. at 451), but to date the NYC has refused to honor this commitment.

The other way in which Chicago grain interests were injured by the rates came about by reason of differences between the application of the new Kankakee combinations on the one hand and the one-factor rates or Chicago combinations on the other hand. The Commission merely noted this problem in passing (310 I.C.C. at 451) but did not discuss it. The new Kankakee combinations were designed to meet the needs of the Kankakee processor. It is true, as the Commission noted (310 I.C.C. at 451) that the new Kankakee combinations on *corn products* applied via Chicago, but these combinations were subject to more restrictive transit privileges and more restrictive routing than Chicago processors had previously had available on the one-factor rates or Chicago combinations. So, while the Commission was technically correct in saying, insofar as *corn products* were concerned (310 I.C.C. at 451), that Chicago "has the same stature as all other corn-processing points in official territory in their [*i.e.* the Kankakee combinations'] application," the Commission did not deal with the question of why Chicago processors should not, as a matter of proper rate relations, have the same rates available to them on the basis of the Chicago combinations.

The rates involved were first published, effective December 15, 1956, in the belief, according to the railroads, that the resulting violations of the long-and-short-haul provision of section 4 of the Act were fully protected by outstanding relief. This was not the case, however, and when the railroads published additional rates to become effective July 30, 1957 (later postponed to August 29, 1957), they filed F.S.A. No. 33955 for authority to continue the rates already established and to establish and maintain the additional rates which also would result in violations of section 4 of the Act.

The new rates and the fourth-section relief sought were protested by the Board of Trade, Mechling, and several other commercial interests. The Commission, however, refused to suspend the rates, and it granted "temporary" fourth-section relief to continue the rates already in effect and to establish and maintain the newly published rates. After a period in which all the rates were under a temporary restraining order, they all became effective November 28, 1957.[6]

Throughout all stages of this proceeding the Board of Trade has actively and vigorously opposed the fourth-sec-

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[6] On August 28, 1957, Mechling and another shipper commenced an action in the United States District Court for the Northern District of Illinois to set aside and enjoin the Commission's temporary F.S.O. No. 18784, and on that date an order temporarily restraining the enforcement and operation of the order was obtained. (*A. L. Mechling Barge Lines Inc.* v. *United States*, Civil Action No. 57 C 1450.) On September 25, 1957, the Board of Trade was permitted to intervene as a party plaintiff in that action. Thereafter the United States and the Commission filed a motion to vacate the temporary restraining order and to dismiss the complaint "for lack of jurisdiction of the subject matter for the reason that the action of the Commission complained of in the complaint is vested exclusively within the power and scope of authority of the Commission and therefore are not orders which are subject to review by this Court." On November 28, 1957, the three-judge district court, without opinion, and without the entry of any findings of fact, granted the motion of the United States and the Commission, dismissed the complaint "for want of jurisdiction," and vacated the temporary restraining order. Although such action was clearly in error (*Baltimore and O. R. Co.* v. *United States*, 264 U.S. 258, 263, 264; *Dixie Carriers* v. *United States*, 143 F. Supp. 844, 853-854; *Mechling Barge Lines* v. *United States*, 368 U.S. 325 (1962)), no appeal was taken from that order, plaintiffs being of the opinion that a decision after hearing on the merits could be obtained from the Commission before such an appeal could be heard and determined by the Supreme Court, a judgment which proved to be grossly erroneous. In other litigation, however, the Department of Justice and the Commission have since conceded that such an order, granting temporary fourth-section relief without supporting findings, is invalid. *Mechling Barge Lines* v. *United States*, 368 U.S. 325 (1962).

tion relief sought. At the hearing, the Board of Trade submitted evidence to show that, even if the proposed rates were found to be compensatory and not lower than necessary to meet the alleged barge competition, they would still be unduly prejudicial to Chicago grain interests in violation of section 3(1) of the Act. As stated, however, the Commission refused to consider this evidence, holding that the issues concerning discrimination raised by the Board of Trade did not "directly deal with the fourth-section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings." 310 I.C.C. at 451. Now, after five years of litigation, the Commission and the railroads would require the Board of Trade to file a formal complaint, present the same evidence all over again, and wait another three, four, or five years before it could obtain relief from the unlawful rates which are constantly depriving Chicago grain interests of business which they previously had, thereby causing them substantial and irreparable damage.

THE QUESTION IS SUBSTANTIAL.

The question here presented has never been directly ruled on by this Court. However, in *Intermountain Rate Cases*, 234 U.S. 476, 485-486 (1914), this Court, in discussing the extent of the Commission's power to relieve carriers from the long-and-short-haul requirement of section 4 of the Act, said:

> But while the public power, so to speak, previously lodged in the carrier is thus withdrawn and reposed in the Commission the right of carriers to seek and obtain under authorized circumstances the sanction of the Commission to charge a lower rate for a longer than for a shorter haul because of competition or for other adequate reasons is expressly preserved and, if not, is, in any event, by necessary implication, granted.

> And as a correlative the authority of the Commission to grant on request the right sought is made by the statute to depend upon the facts established and the judgment of that body, in the exercise of a sound legal discretion, as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned, and in view of the preference and discrimination clauses of the 2d and 3d sections.

The holding of this Court that the Commission's authority to grant section 4 relief is made by the Act to depend on the facts established and the exercise of the Commission's sound legal discretion as to whether granting the request would be compatible, among other things, with the anti-discrimination provisions of section 3(1) of the Act, would seem necessarily to imply that shippers who would be injured by fourth-section-departure rates have the right to appear in the proceeding in which the carriers ask for such relief and to have their evidence considered by the Commission in determining whether such relief should be granted. The Commission, therefore, under the Act as interpreted by this Court, must, in a fourth-section proceeding, consider whether the grant of the authority sought would be compatible with section 3, if that issue is raised by a protestant who has participated in the hearing and introduced evidence on that issue. The Commission's grant of fourth-section relief in this case without consideration of properly raised section 3 issues exceeded its statutory authority.

In addition, the national transportation policy calls for the maintenance of "reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices," and it provides that "all" the provisions

of the Act shall be administered and enforced with a view to carrying out the policy; it does not say that "all of the provisions except those in section 4 of the Act" shall be so enforced. The Commission is required to take cognizance of the national transportation policy and apply the Act "as a whole." *American Trucking Assos.* v. *United States,* 355 U.S. 141, 152 (1957).

It would seem obvious that it is beyond the power of the Commission to authorize fourth-section-departure rates which would violate other sections of the Act, and, heretofore, the Commission itself has repeatedly so held.[7] The Commission did not explain why it departed, in the instant case, from its own precedents on the question of its power to grant fourth-section relief, but this may be explained

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[7] In a long line of decisions, the Commission has followed the teaching of this Court in the *Intermountain Rate Cases,* 234 U.S. 476, *supra,* and has held that it would not authorize rates which did not conform to the requirements of section 4 of the Act if such rates would violate other sections of the Act, particularly sections 2 and 3. *Commodity Rates on Lumber and Other Forest Products in Carloads, From South Pacific Coast Territory to Points in Central Freight Association Territory,* 165 I.C.C. 561, 569; *Bituminous Coal to Buffalo, N. Y.,* 219 I.C.C. 554, 560; *Differential Routes to Central Territory,* 211 I.C.C. 403, 421; *Pig Iron to Butler, Pa.,* 222 I.C.C. 1, 2; *Iron and Steel to Minnesota,* 231 I.C.C. 425, 428; *Sand and Gravel to Northfield and Evanston, Ill.,* 234 I.C.C. 65, 68; *Coal and Coal Briquets in the South,* 287 I.C.C. 341, 376-377; *Transcontinental Cases of 1922,* 74 I.C.C. 48, 71; *Passenger Fares, Hell Gate Bridge Route, New York, N. Y.* 296 I.C.C. 147, 153; *Crude Barytes Ore from Missouri to Corpus Christi and Houston,* 299 I.C.C. 505, 508; *Iron and Steel from Minnequa to Kansas, Nebraska, and South Dakota,* 278 I.C.C. 163, 168-169; *Nepheline Syenite from Ontario, Canada, to the East,* 308 I.C.C. 561, 564-565 (1959). *Railroad Commission of Nevada* v. *S. P. Co.,* 21 I.C.C. 329, 338-339. Typical expressions of the Commission in these cases on that point have been set forth in Appendix F hereto. While some, but not all, of the foregoing cases also involved investigations under section 15 of the Act, that does not impair the validity of the reasons given by the Commission as to why fourth-section relief should not be granted to maintain rates which would violate other sections of the Act.

by a dictum in the decision of a three-judge District Court for the Southern District of New York in *Seatrain Lines v. United States*, 168 F. Supp. 819 (1958), a case on which the Commission's counsel relied in the court below in support of the Commission's order and which the lower court cited in its opinion in support of its approval of the Commission's refusal to consider the issues concerning discrimination against Chicago raised by the Board of Trade. (Appendix A, p. 4a)

The *Seatrain* case was an action brought by a competing water carrier to set aside and enjoin a permanent fourth-section order, granted by the Commission without a hearing, allowing rail carriers to depart from the long-and-short-haul provision of section 4 of the Act and to charge less for the transportation of articles between eastern points of origin and southwest gulf ports than was charged to intermediate inland points. The District Court set aside and enjoined the order on the ground that it lacked the necessary supporting findings of fact.

One of the contentions made by the plaintiff water carrier in that case was that the order discriminated against it. Although not necessary to the decision in the case, the order having been set aside on other grounds, the District Court said (p. 824):

> However, Section 4 does not contemplate that there shall be a determination in a Section 4 proceeding as to whether the rates charged are unduly discriminatory against a competing water carrier. This question must be raised by proceedings under Sections 13 and 15 of the Interstate Commerce Act. In such proceedings a hearing must be held at which all parties affected, carriers, shippers and communities, can be heard and their respective interests appropriately weighed and balanced by the Commission.

> Thus, in so far as the plaintiff claims discrimination against it resulting from the new authorized rates, it has not exhausted its administrative remedies because it has not petitioned for a hearing under Sections 13 and 15 at which such claims would be determined.

Since Seatrain succeeded in setting aside the order involved, it did not appeal; the Government did not appeal, and the Commission reopened the case for further proceedings.

The District Court in *Seatrain* cited no authority, did not discuss the opposing arguments, gave no reasons for its decision, and did not even refer to the national transportation policy to the effect that all sections of the Act should be administered and enforced to carry out the policy against unjust discriminations and undue preferences and advantages. The dictum in the *Seatrain* case is plainly wrong.

Another case cited by the court below was *United States* v. *Merchants & M. Traffic Asso.*, 242 U.S. 178 (1916) (the *Sacramento* case), which the lower court cited for the proposition that the Board of Trade's evidence "was not relevant in this Fourth Section proceeding." (Appendix A, p. 4a) The *Sacramento* case clearly does not so hold since the parties who sought court review in that case had not even participated in the hearings before the Commission. In that case, those parties applied, after the entry of the Commission's order complained of, for a rehearing for the purpose of introducing new evidence to show discrimination against them. After their petition for rehearing was denied, they brought suit to set aside and enjoin the order. This Court held that, under the circumstances, their remedy was under sections 13 or 15 of the Act.

In so holding, the Court said (p. 188):

> Respondents contend that, after the amended order was entered and the tariffs filed, they did apply to the Commission for relief, "but were denied the right of a hearing," and that "their protest and demand were ignored and denied." What they did was to petition for a "rehearing" in the proceedings under the 4th section, to which they now say they were not parties, instead of applying for redress under § 13, as they had a legal right to do. They mistook their remedy. To permit communities or shippers to seek redress for such grievances in the courts would invade and often nullify the administrative authority vested in the Commission; . . .

It is apparent, therefore, that the holding of this Court in the *Sacramento* case is no precedent for denying appellant relief here. The Board of Trade was a party to all the Commission proceedings. It has had a hearing at which it submitted evidence showing discrimination against Chicago. It filed a brief and was heard on oral argument. But the Commission refused to consider that evidence on the ground that the issues raised by the Board of Trade did not concern "fourth-section principles."

In addition to the *Sacramento* case and the *Seatrain* case, the lower court also cited in support of its holding, *Koppers Co.* v. *United States,* 132 F. Supp. 159, 163 (D.C. W.D. Pa., 1955) and *Florida Citrus Comm'n* v. *United States,* 144 F. Supp. 517, 526 (D.C.N.D. Fla., 1956). These two cases are not in point. Neither of those cases involved the requirements of section 4 of the Act. In both of those cases the court simply declined to set aside a Commission order in a "general revenue increase" case, saying that the remedy of a person aggrieved by such an order was under section 13(1) or section 15(1) of the Act. The sit-

uation here is entirely different. The present case is not a "general revenue increase" case. It is a specific "rate" case, in which the Commission has authorized particular rates which result in undue prejudice to some shippers and undue preference of others.

There can be no dispute over the fact that the Commission's holding in this case, if affirmed by this Court, would work a severe hardship on the Board of Trade. When this case started, the Commission had given no indication that it would depart from the principle, which it had consistently followed, that it would not grant relief to maintain fourth-section-departure rates which violated other sections of the Act. It permitted the Board of Trade to introduce evidence as to the undue prejudice against Chicago grain interests, which it should not have done had it considered that such evidence was not "relevant" to the issues before it. And now, after more than five years of litigation, during which time the business of the members of the Board of Trade has been irreparably damaged by a temporary fourth-section order which was invalid in the first place[8] and by a permanent fourth-section order which was issued without regard to the Commission's obligations under the Act, the Commission and the railroads ask that the Board of Trade be required to file a formal complaint under section 13(1), introduce the same evidence, and try the same issues all over again. Even in the *Seatrain* case, all that the court there suggested was that "a hearing must be held at which all parties affected, carriers, shippers and communities, can be heard and their respective interests appropriately weighed and balanced by the Commission.'"[9] 168 F. Supp. at 824. When such a hearing

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[8] See footnote 6, p. 10.

[9] It will be remembered that in the *Seatrain* case there had been no hearing prior to the grant of *permanent* fourth-section relief.

has already been held under section 4(1), it would seem to be the height of absurdity to require another such hearing to be held under section 13(1).

The problem presented by this appeal is a constantly recurring one, affecting many shippers in addition to those at intermediate points. This is attested to by the number of cases cited in Appendix F hereto. Indeed, it would be a rare occurrence in a contested fourth-section case if the interests of such shippers were not vitally involved. Up to this time, the Commission has always considered the evidence of shippers who either protested or supported the granting of fourth-section relief. There is nothing in either the Commission's general rules of practice (49 CFR 1.1-1.102) or in its special rules governing the handling of fourth-section applications (49 CFR 143.75-143.85) which in any way restricts the right of an injured shipper to be heard in opposition to the granting of such relief, or which even suggests that the evidence of such a shipper, once admitted, will not be considered. But the right of the shipping public to be heard and to have its evidence considered in a fourth-section case will be subject to doubt and confusion until the obligations of the Commission in such a case are definitely settled, and the only way they can be definitely settled is by a decision of this Court.

Not only is the legal issue presented by this appeal of general public importance, but, in addition, the effect which the result of the decision will have upon an important segment of the grain-rate structure, of itself, makes this a case of general public importance. Throughout the period of this litigation, the Kankakee combinations have had a very disturbing effect on the structure of grain rates from Illinois to the East. A majority of a special grain

committee of the eastern railroads has twice recommended the cancellation of this adjustment[10]. The predictions of that committee have proved to be correct. The competitive pressures set up by this adjustment have been enormous. An elevator having the benefit of these special, preferential rates, can take all the business away from a competing elevator just a few miles away which does not have the benefit of the rates, causing cross-country competition affecting all railroads and shippers in the area.

There are now pending before the Commission four proceedings which have resulted, at least in part, from the establishment of the Kankakee combinations on corn products here in issue: No. 33471, *Corn & Corn Products—Illinois & Indiana to the East;* No. 33743, *Corn & Corn Products from Illinois & Indiana to Md., Mass., N. Y., Va.;*

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[10] In a report, dated April 13, 1961, that committee said:

> The Item 279 publication [*i.e.* the Kankakee combinations] grew out of approval by the Traffic Executive Association—Eastern Railroads at the October 18, 1956 meeting (Topic 19), of the proposal that had been considered and declined by the General Freight Traffic Committee—Eastern Railroads under Submittal No. C1301-383. That proposal suggested the establishment of a rate of 5 cents per 100 pounds including the X-196 increase on corn, carloads, minimum weight 100,000 pounds to Kankakee, Ill. from NYC(W) stations located west of Kankakee for application only as described above. The purpose of that tariff revision was to enable the New York Central to meet Illinois River competition which had severely reduced the tonnage from the NYC(W) stations involved. With cancellation of the Item 279 adjustment, the general basis of rates recommended will meet the competitive situation that Item 279 was designed to meet. The cancellation is recommended by the majority of the TEA-ER Special Grain Committee because it is felt that the maintenance of the Item 279 adjustment will lead the way for demands for similar publication on behalf of other interests thereby contributing to a further erosion of the general rate level and because maintenance of the Item 279 adjustment presents a difficult cross-country situation for rail lines serving adjacent stations.

No. 33916, *Corn & Corn Products from NYC Origins in Ill. & Ind. to the East;* and I. & S. No. 7807, *Corn & Corn Products—Illinois & Indiana to the East.* A recommended report of the hearing examiner in the case last named has just been released, in which he referred to the Commission's report in the *Kankakee* case as follows (p. 23):

> In the past when the rail carriers were in control of the grain rate adjustment free of competition from other modes, the Commission, in numerous proceedings has consistently refused to extend the rate-breaking system to communities which did not meet the specifications of a primary market. *The Kankakee Case* 310 I.C.C. 437, above mentioned, is the only exception, which took effect in December 1956, and that is based strictly on considerations of section 4.

That statement shows the uncertainty which is going to exist until this Court finally determines the obligations which the Commission must meet in granting relief from the provisions of section 4 of the Act, by holding that the Commission may not, in purported reliance on "fourth-section principles," refuse to consider evidence submitted by shippers who would be injured which shows that the fourth-section-departure rates for which authority is sought would be in violation of section 3(1) of the Act.

CONCLUSION

For the reasons stated, it is submitted that the question presented by this appeal is substantial, that it is of public importance, and that, in its decision, the Court should have the benefit of briefs on the merits and of oral argument.

Respectfully submitted,

HAROLD E. SPENCER
RICHARD M. FREEMAN
One North LaSalle Street
Chicago 2, Illinois
Counsel for Board of Trade of the City of Chicago, Appellant

J. S. CHARTRAND
141 West Jackson Blvd.
Chicago 4, Illinois

BELNAP, SPENCER, HARDY & FREEMAN
One North LaSalle Street
Chicago 2, Illinois
Of Counsel

Dated: January 11, 1963

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

A. L. MECHLING BARGE LINES, INC., et al.,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.

No. 61 C 169

Before KILEY, Circuit Judge, and HOFFMAN and AUSTIN, District Judges.

This is a suit by Mechling Barge Lines, Inc., a common carrier, and several grain elevator operators served by barges, to set aside an order of the Interstate Commerce Commission. The order continued in existence a reduced rail rate for corn and corn products transported on the New York Central Belt Line. The Chicago Board of Trade was permitted to intervene as a plaintiff and the New York Central Railroad and several grain elevator operators on its Belt Line were permitted to intervene as defendants.

The Belt Line west of Kankakee, Illinois, roughly parallels the Illinois River on which the barges operate. The barge lines and elevators served by them are in competition with the Belt Line and elevators served by it for the business of transporting corn from northern and central Illinois to destinations on the eastern seaboard. Some farmers sell their corn to elevators for transportation by barge to an east-west railroad and others sell theirs to elevators for transportation by the north-south Belt Line to a connecting east-west railroad or to merchants in Chicago. The transportation rates are of course very important in the competition.

Prior to the published New Kankakee all-rail combination rate, the through one-factor rates for grain and grain products from Streator on the Kankakee Belt Line to New York were 72.5¢ per cwt.; the Chicago combination from stations on the Kankakee Belt Line consisted of a local rate of 23¢ to Chicago, plus the 49.5¢ reshipping rate east, or 72.5¢ per cwt.; the Kankakee combination rate from stations on its Belt Line to Kankakee and reshipping to the east was also composed of the same rate factors. Thus, the through one-factor rates, the Chicago combination and the Kankakee combination, were all equal.

The proposed new Kankakee combination reduced the rate on corn and corn products from stations on the Kankakee Belt Line to 6¢ on corn milled-in-transit for the purpose of meeting the barge competition on the Illinois River, plus a reshipping rate of 49.5¢ beyond Kankakee to the east. The local, or 6¢, rate was to apply only when the product was destined for shipment to eastern destinations. The local, or 6¢, rate was not applicable to whole corn, nor was the rate to Chicago reduced although the Kankakee combination was available to Chicago processors via Kankakee. Application of the new Kankakee combination resulted in a charge less for the longer than for the shorter distance of transportation in that a lower charge from stations west of Kankakee to the east was effected than resulted from Kankakee and intermediate origins to the same destinations.

The New York Central Railroad applied to the Commission for approval, to obviate the violations of 49 U.S.C.A. Section 4[1], of a proposed rate. Plaintiffs and the Board

[1] 49 U.S.C.A. Section 4. Long and short haul charges; competition with water routes.

of Trade protested the application. The Commission granted temporary authority for immediate application of the rate, but ordered a hearing.

The scope of review to be accorded this order is conceded by all litigants to be governed by the Administrative Procedure Act, 5 U.S.C.A., particularly Section 1009(e).[2] Because no dispute exists as to the standards to be applied, this court will allude briefly to the basic concept of such review. In *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 140 (1938), the scope of review is stated to be as follows:

> "* * * Only questions affecting constitutional power, statutory authority, and the basic prerequisite of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. *Interstate Commerce Comm.* v. *Illinois Central R. Co.*, 215 U.S. 452, 470; *Interstate Commerce Comm'n* v. *Union Pacific R. Co.*, 222 U.S. 541."

Plaintiffs claim error in the refusal of the Examiner and the Commission to admit evidence that the proposed rate was discriminatory, unjust and unreasonable, in violation of the Transportation Act;[3] and that the rate failed to preserve the inherent advantage that the National Transportation Policy[4] gives the water carrier. The evi-

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[2] Section 1009(e) provides for the scope of judicial review of agency action to ensure that such action is not unlawfully withheld or unreasonably delayed, or not in accordance with law, procedural or substantive, and that such action is warranted in fact and supported by substantial evidence.

[3] 49 U.S.C.A. Section 15(1).

[4] The declared national transportation policy is to provide, preserve and promote the "fair and impartial regulation of all modes of transportation * * * to recognize and preserve the inherent advantages of each," in order to ensure a national transportation system adequate to meet the needs of commerce and national defense. 49 U.S.C.A. note preceding Section 1.

dence was excluded for the reason that it was not appropriate in this "Fourth Section" proceeding although it would be pertinent upon a complaint under Section 13(1)[5] or a Commission investigation under Section 15(1).[6]

Plaintiffs argue that the Examiner and Commission were bound not to grant the application under Section 4 if to do so involved violation of the other sections noted. We are referred to the Commission's conclusion that granting the application "would not be disharmonious with the other provisions of the Act," to show what the plaintiffs contend is an inconsistency.

We may disregard that conclusion as surplusage and we see no error in the exclusion of the evidence of violation of other sections of the Act. The relief granted is permissive only and the evidence offered was not relevant in this Fourth Section proceeding. *United States* v. *Merchants & M. Traffic Ass'n*, 243 U.S. 178 (1916). Due regard was given to the policy and statutory scheme of the Act within the limits afforded by Section 4 and under that Section the Commission is not required to make specific ultimate findings that a rate is lawful and not discriminatory. The water carrier and other plaintiffs have failed to utilize the provisions of sections of the Act which afford the Commission the proper scope for such determination. *United States* v. *Merchants & M. Traffic Ass'n*, 242 U.S. 178, 188 (1916); *Koppers Co.* v. *United States*, 132 F. Supp., 159, 163 (D.C. Pa., 1955); *Florida Citrus Comm'n* v. *United States*, 144 F. Supp. 517, 526 (D.C. Fla., 1956); *Seatrain Lines* v. *United States*, 168 F. Supp. 819, 825 (D.C.N.Y., 1958).

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[5] 49 U.S.C.A. Section 13(1).
[6] 49 U.S.C.A. Section 15(1).

The Commission found that the "competitive situation which prevailed prior to the proposed rate between the all-rail and barge-rail rates" needed an adjustment under Fourth Section relief. It required a showing that the proposed rates are "reasonably compensatory and no lower than necessary to meet the competition." It found that the evidence that the proposed rate was compensative and set forth the details supporting that finding, and concluded that the New York Central had shown "a special case within the meaning of Section 4[7] of the Act by nature of actual and compelling competition," and that the rate was no lower than necessary to meet that competition, was not destructively competitive and would not impose an undue burden on other traffic.

The question raised upon these findings and conclusions is whether the Commission was correct in considering the entire combination rate within the compensatory test of Section 4, or whether, as the Hearing Examiner did, it should have confined such test to the local rate from Moronts to Kankakee, *i.e.*, the 6¢ rail charge for the trip from the western origins of the Kankakee Belt Line to Kankakee. Admittedly, the only rate competitive to the barge route is the local or proportional rate to Kankakee, there having been no change in the 49.5¢ reshipping rate to the east. However, as the Commission emphasized, the

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[7] Section 4 of the Transportation Act provides:

"* * * That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of . . . property . . . but in exercising the authority conferred upon it by this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence; . . ."

6¢ charge is not collected separately. When shipments originate west of Kankakee they are shipped to Kankakee via the local or flat rate of 23¢ and only when there is a reshipment for corn milled-in-transit to points east of Kankakee will the 6¢ rate be applied. Thus, on reshipment east, there is adjustment made giving recognition to through shipping by reducing the flat or local rate to the 6¢ figure. Consequently, the 6¢ does not exist as a separate charge, but exists only when the combination rate comes into being and a departure from the prohibition of Section 4 occurs when the 49.5¢ reshipping rate is applied. It is clear from the legislative history of this section that Congress was concerned with the long-haul being reasonably compensatory to the carrier and that the Commission so find to grant Section 4 relief. See *Detroit Board of Trade* v. *Grand Trunk Railway*, 2 I.C.C. 199, 202 (1888); *Imperial Coal Co.* v. *Pittsburgh & L.E. R. Co.*, 2 I.C.C. 436, 445 (1889); and *Sheldon Axle & Spring Co.* v. *Lehigh* v. *R.R. Co.*, 53 I.C.C. 43, 44 (1919). The Commission was correct in considering the combination rate and not the single 6¢ proportional.

The final question is whether the report and the findings and conclusions are supported by substantial evidence in the record as a whole. A departure from Section 4 is accorded only in special cases. The record is replete with exhibits and testimony which show that prior to the changed rate almost all free corn, as distinguished from government corn, grown in the geographical area involved was shipped via barge to Chicago and thence by rail to its eastern termini. This obvious disparity of corn shipment was found to exist by the Hearing Examiner and the Commission. 310 I.C.C. 438-441. That a special case exists by virtue of actual and compelling competition has been recognized. *In re Louisville & Nashville R.R. Co.*, 1

I.C.C. 31, 78 (1887); *Intermountain Rate Cases, supra; Skinner & Eddy Corp.* v. *United States,* 249 U.S. 557 (1919); *Nepheline Syenite from Ontario, Canada to the East,* 308 I.C.C. 561, 564-565 (1959).

A reasonably compensatory rate was defined by the Commission in the *Transcontinental Cases of 1922,* 74 I.C.C. 48, 71, as follows:

> "• • • We are of the opinion and find that in the administration of the fourth section the words 'reasonably compensatory' imply that a rate properly so described must (1) cover and more than cover the extra or additional expenses incurred in handling the traffic to which it applies; (2) be no lower than necessary to meet existing competition; (3) not be so low as to threaten the extinction of legitimate competition by water carriers; and (4) not jeopardize the appropriate return on the value of carrier property generally, as contemplated in Section 15(a) of the act."

These criteria have received judicial approval. See *Dixie Carriers* v. *United States,* 143 F. Supp. 844 (D.C. Tex., 1956). In the instant case comparative earnings, rate levels and operating costs were submitted to support the compensativeness of the proposed rate. 310 I.C.C. 437, 448-449. This was a proper formula to support the Commission's finding. *Fed. Power Comm'n* v. *Natural Gas Pipeline Co.,* 315 U.S. 575, 586 (1942); *United States* v. *Northern Pacific Ry. Co.,* 288 U.S. 490, 500 (1933); *Youngstown Sheet & Tube Co.* v. *United States,* 295 U.S. 476, 480 (1935); *City of Harrisonburg* v. *Chesapeake & O. Ry. Co.,* 34 F. Supp. 64, 644-645 (D.C. Va., 1940); *Tidewater Associated Oil Co.* v. *A. T. & S. F. Ry. Co.,* 278 I.C.C. 586, 589; *Summer Co.* v. *Erie R. Co.,* 262 I.C.C. 43, 46. In finding that the rate was no lower than necessary, the Commission also examined the bid prices of the two modes of transportation and the effect they had on those country

elevators located between the Illinois River and the Belt. In finding that the rate was not destructive of competition nor unduly burdensome, the Commission had before it evidence of the amount of corn shipped via the two modes of transportation in the periods here in question.

In scrutinizing the evidence upon which the order is premised, the court will not consider the "expediency or wisdom of the order, or whether, on like testimony it would have made a similar ruling,". *Interstate Commerce Comm'n* v. *Union Pacific R. Co.*, 222 U.S. 541, 547, 548 (1911); *Virginian Railway Co.* v. *United States*, 272 U.S. 658, 663 (1926); *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 536 (1945), but will consider only whether in the record as a whole there is substantive evidence to support the order. 5 U.S.C.A. Section 1009(e); *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474 (1950).

There is no challenge of the detailed facts underlying the findings or conclusions and we find that there is the requisite substantial basis for the findings and conclusions. *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 140.

We conclude that the order in question was within the statutory power of the Commission, that it is supported by findings and conclusions based on substantial evidence, and that no prejudicial error occurred in the hearings before the Examiner and Commission. For these reasons we think the complaint should be dismissed. The order of dismissal is being entered this day.

DATE: September 18, 1962.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

A. L. MECHLING BARGE LINES, INC., et al.

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.

61 C 169

JUDGMENT

The above entitled cause having come on for final hearing before a duly constituted district court of three judges convened pursuant to Sections 2284 and 2326 of Title 28, United States Code, and the Court having considered the pleadings and the record before the Commission, and the arguments and briefs of counsel, and the Court being fully advised in the premises and having filed its opinion, it is hereby

ORDERED, ADJUDGED and DECREED that the relief prayed for in the complaint be, and it is hereby, denied, and the complaint is dismissed, plaintiff to pay the costs.

Dated this 18th day of September, 1962.

s/ ROGER J. KILEY

Judge, United States Court of Appeals

s/ JULIUS J. HOFFMAN

Judge, United States District Court

s/ RICHARD B. AUSTIN

Judge, United States District Court

29096

INTERSTATE COMMERCE COMMISSION

FOURTH SECTION APPLICATION NO. 33955

CORN AND CORN PRODUCTS FROM ILLINOIS TO OFFICIAL TERRITORY

Decided June 8, 1960

Authority granted, on conditions, to continue or to establish and maintain on corn products from origins in northern Illinois on that part of the New York Central Railroad's Kankakee Belt Line extending eastward from Moronts to Van's Siding, Ill., both inclusive, to points in central, trunkline, and New England territories, rates composed of a combination of proportional rates to and from Kankakee, Ill., without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act.

Richard J. Murphy, *William C. Leiper*, and *Daniel J. Sweeney* for applicants.

Freeman Bradford, *Leo P. Day*, and *A. C. Schier* for interveners in support of the applicants.

Edward B. Hayes, *Wilbur S. Legg*, *Nuel D. Belnap*, *Harold E. Spencer*, *Richard J. Hardy*, *Richard M. Freeman*, *James V. Springrose*, *Lawrence Farlow*, *James C. Scott*, *I. M. Funk*, *Ronald E. Tallyn*, *E. S. Herron*, *R. D. Erickson*, and *J. S. Chartrand* for protestants.

REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS HUTCHINSON, MCPHERSON, AND HERRING

BY DIVISION 2:

The parties filed exceptions to the report proposed by the examiner, to which replies were made. We have heard the parties in oral argument. Our conclusions differ from those recommended in the proposed report. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

By this application, as amended, carriers parties to the New York Central Railroad Company tariff I.C.C. No. 1169 and Agent H. R. Hinsch's tariff I.C.C. Nos. 4403 and 4499, apply for authority to continue or to establish and maintain over their existing direct all-rail routes for the transportation of corn products from origins in northern Illinois on that part of the New York Central's Kankakee Belt Line extending eastward from Moronts to Van's Siding, Ill., both inclusive, to points in central, trunkline, and New England territories, rates composed of a combination of proportional rates

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to and from Kankakee, Ill., as hereinafter described, without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act.

The schedules containing the rates and the application were protested by A. L. Mechling Barge Lines, Inc., hereinafter called Mechling, Cargill, Inc., and the Waterways Freight Bureau, as well as by the Board of Trade of the city of Chicago, the Indiana Board of Trade, two State associations of Illinois elevators, the Illinois Grain Corporation, the Norris Grain Company, and others. The General Foods Corporation, Indianapolis Board of Trade, Evans Milling Company, Illinois Cereal Mills, and several operators of elevators on the Kankakee Belt Line of the New York Central intervened on behalf of the applicants. Suspension was denied, and fourth-section relief was granted temporarily by order No. 18784, entered August 27, 1957, until further order after hearing.

However, on August 28, 1957, certain of the protestants filed an appeal with the United States District Court for the Northern District of Illinois, Eastern Division, to set aside the Commission's temporary fourth-section order and to enjoin the use of the rates without fourth-section relief. A temporary restraining order was issued on that date making the Kankakee combinations inoperative until November 28, 1957, when the court order was vacated and the court action dismissed.

A hearing has been held in the matter of the fourth-section relief sought and several of the respective parties introduced testimony and other evidence according as their interests were affected. In the interest of clarity the rates for which fourth-section relief is herein sought will be referred to as the proposed rates, and those in effect previously as the prior rates. Except as otherwise indicated, all rates and charges are stated in amounts per 100 pounds, include the increase authorized in Ex Parte No. 206, and are subject to the increase authorized in Ex Parte No. 212.

The proposed reduced rates are designed to recapture traffic represented as having been lost to competing barge lines operating by way of Chicago in conjunction with rail lines beyond. The carriers do not desire to reduce existing rates at higher rated intermediate points not affected by the same competitive conditions.

Historically, the rail rates on grain and grain products from northern Illinois, including the considered origins, to eastern destinations were combinations over Chicago, Ill., and later when single-factor rates were established they were made equal to the combinations, the rates on the corn products having been maintained uniformly 0.5 cent higher than the rates on grain. On traffic accorded transit, the local or flat rates were generally observed to the gateway points, for example Chicago or Kankakee, and the

reshipping rates therefrom applied on the outbound movement, observing as minimum the single factor through rate or the flat rate from the gateway, whichever was higher, in conformity with outstanding fourth-section relief.

In an effort to meet the competition of the barge-rail routes, effective December 15, 1956, the New York Central established a proportional rate of 5 cents (subsequently increased to 5.5 and 6 cents, respectively, under Ex Parte Nos. 206 and 212), minimum 100,000 pounds, on corn and corn products from the considered origins to Kankakee over its line direct for application in conjunction with the existing proportional or reshipping rates beyond on traffic milled in transit and finally destined to points in the western termini of eastern trunklines and east thereof. At the same time, the through single-factor rates from these origins to final destination, as well as the flat rate from Kankakee to final destination, previously observed as minimum in connection with the prior rates, were restricted so as not to apply when the combination of the proposed proportional rates to and from Kankakee to final destination is lower. The proposed rates were permitted to become effective at that time without protest and were published in the belief that outstanding relief protected any departures which might occur. However, it was subsequently discovered that by limiting the rates to points at the western termini of eastern trunklines and east thereof, unauthorized departures were created at destinations in central territory. Moreover, by eliminating the application of the single-factor through rates from origin to final destination, as well as the flat rate from Kankakee to final destination as minimum, origin departures were created at Kankakee and points east, north, and south thereof. To eliminate the unauthorized destination departures the same combination of proportionals was established for application on like traffic from the same origins to destinations in central territory effective July 30, 1957, which date was voluntarily postponed until August 29, 1957, and because of the temporary restraining order entered by the court did not become effective until November 28, 1957.

The considered rates, as indicated, are designed to meet the barge-rail combination rates over Chicago, comprising the local barge rates to Chicago and the rail reshipping rates to eastern destinations, which are the same as in effect from Kankakee. The local barge rates from 10 Illinois River ports [1] to Chicago ranged from 3.5 to 6 cents on December 5, 1957, and effective December 6, 1957, 3.65 to 6.25 cents when they were increased slightly. There is no milling-in-transit requirement for the application of the barge-rail combination

[1] Lockport, Joliet, Morris, Seneca, Ottawa, La Salle, Spring Valley, Hennepin, Henry, and Lacon, Ill.

rates. In arriving at the inbound proportional under the proposed rates, the weighted average barge rate of 4.695 cents on the barge movement for the period December 16, 1956, to November 11, 1957, from the 10 ports to Chicago was considered as the competitive rate. On the same movement the weighted average barge rate would be 4.295 cents effective December 6, 1957.

The proposed rates have application only in connection with the reshipping rates on grain products insofar as they apply on certain corn products. In the first instance the corn is moved from its Belt origin to Kankakee or other transit points in official territory under the flat rate. After milling in transit and reshipment of corn products, the inbound charges are readjusted on the basis of the proportional rate on corn to Kankakee and the reshipping rates on grain products from Kankakee, and the credit is applied to the outbound movement of corn products. Charges for the shrinkage and manufacturing loss remain on the basis of the local rate to the transit point.

The Kankakee Belt Line west of Kankakee roughly parallels the Illinois River in northern Illinois. Morents is on the river about 4 miles from the nearest river port of Spring Valley, Ill., and Van's Siding, which is the most distant point from the river, is about 22 miles south of its nearest port of Joliet, Ill. The northern Illinois territory produces a surplus of corn. At one time, the corn moved over all-rail routes to eastern destinations. However, the development of commerce on the Illinois River about 20 years ago started a diversion of the all-rail movement to barge-rail routes extending from river ports by barge to Chicago, Ill., and thence by rail to eastern destinations. In 1935, 1940, and 1957, respectively, about 1.5, 19, and 80 million bushels of grain, including 0.7, 16, and 34 million bushels of corn, moved by barge from all Illinois River ports to Chicago. The bulk of the corn moved by barge originates at the 10 river ports which range from 4 to 36 highway-miles from the Belt origins, and is drawn from farms ranging up to 40 miles from the ports.

The primary business available to the New York Central at the origin points is grain, predominately corn, traffic. During 1954, 1955, and 1956, respectively, 467, 729, and 615 carloads of grain, including 305, 533, and 404 carloads of corn originated thereat. Most of it was Commodity Credit Corporation corn[3] which is usually shipped by rail for export, and is not subject to the same competitive forces as "free" corn.[4] In 1957, however, for the 6-, 8-, and 12-month periods ended June 30, August 31, and December 31,

[3] Corn under Government control.
[4] Corn available on the open market.

1957, respectively, 1,515, 2,411, and 2,661 carloads of corn were originated at the Belt origins.

The 1956 corn crop in the area was somewhat heavier than the 1955 crop, thus increasing the movement in 1957. During the period December 15, 1956, to August 30, 1957, hereinafter called the competition period, when the proposed rate was in effect the barge movement by barge from the 10 river ports to Chicago amounted to 493,668 tons, including 287,256 tons by protestant A. L. Mechling Lines, Inc.* Lockport and Joliet, the river ports nearest Chicago, are not affected by the reduced rate to the same extent as the other ports. From Hennepin, Henry, and Lacon, the three ports south of Morenta, the greater part of Mechling's corn business moved to the south in 1956 and north to Chicago in 1957. From the other five ports affected, Mechling's barge movement to Chicago was lower by 22,928 tons in the competition period than during the corresponding period a year earlier.

Cargill Incorporated, Illinois Grain Corporation, Norris Grain Corporation, W. W. Dewey Company, and Glidden Company, operate subterminal elevators at one or more of the ports. Cargill Incorporated's corn purchases at three elevators from the area south of the river dropped from 1,632,092 bushels in the period December 15, 1955, to August 31, 1956, to 1,171,229 bushels in the competition period. From the same area Illinois Grain Corporation purchased 854,226 and 365,005 bushels during the first 8 months of 1956 and 1957, respectively. Norris Grain Corporation experienced purchase declines in 1957 under 1956 at three elevators. The decline at the one elevator most affected amounted to 646,280 bushels in the first 6 months of 1957 under the first 6 months of 1956. W. W. Dewey Company's purchases from four points on the Belt were reduced from 190,000 bushels in the first 8 months of 1956 to 15,000 bushels in the same period of 1957. Glidden Company's elevators were opened in the fall of 1956. Its limited experience indicates a decline in purchases in the area subsequent to the effectiveness of the proposed rate.

The river subterminal elevators are intermediate between the terminal elevators in Chicago and the country buyers in northern Illinois. They are generally operated by the terminal elevators and were established to accumulate corn for river movement. With the exception of Dewey, which purchases both from country buyers and direct from the farmer, this accumulation is by purchase through the country elevatorman. Originally the country elevators sold to

* Includes A. L. Mechling Barge Lines, Inc.'s, wholly owned subsidiary, Marine Transit Company.

buyers for all-rail movement. Their facilities were designed to receive grain from the farmers, assemble it in enclosed lots, and load it into rail cars, these being the same functions as to rail corn as are performed by the subterminal elevators to barge corn. The advent of river transportation and the establishment of subterminal elevators opened another outlet for the corn. In the years immediately preceding the establishment of the proposed rate, when the corn rates on the Belt were prohibitively high, the country elevators near or at the Belt became, for the most part, buyers or merchandisers of corn for barge movement, and elevated only small quantities of corn for which there were local retail requirements. For his service, the country elevatorman realizes from 1 to 4 cents a bushel depending on whether he actually performs an elevation or merely serves as a merchandiser.

The corn is moved from the farms to the elevators in farmer-owned or for-hire trucks, the cost of which, in either case, is borne by the farmer. Most of the corn sold at the river comes directly from the farm with only a small portion coming from the country elevators. The for-hire truck rates are on a distance scale filed and fixed by the Illinois Commerce Commission. They range from 2 to 4 cents a bushel for distances ranging up to 30 miles.

Bids to the farmers are based on the price at the most advantageous terminal market less the country buyers markup and transportation costs. River bids are f.o.b. trucks at river elevator, while Belt bids are f.o.b. rail cars. At the Belt, the farmer stands the cost of elevation; at the river, he does not. Prior to the proposed rate, the free corn sales of elevators on the Belt were made to the river elevators, because corn for river transportation commanded higher prices than corn for rail transportation. The higher prices were attributed to the ability of the river buyers to market the corn at lower transportation costs over the barge-rail routes than rail buyers over the all-rail routes. Since the effectiveness of the proposed rates, it became more profitable for these Belt elevators to ship by rail, and the farmers benefited by the competitive bidding. Despite their ability to pass on to the farmers the advantage of competitive bids, these Belt elevators assert that the amount of corn handled by them has not increased. There is a difference in their business, however, for rather than performing merely the merchandising service on barge corn, they now perform an actual elevation on rail corn. Several country elevators with rail facilities from 3 to 11 miles from the Belt have established portable loaders on the Belt. The 14 supporting elevators contend that without a competitive rail rate, they would again be relegated to the status of merchandisers for

barge movement and the investments in their elevators and facilities for rail shipment would be virtually destroyed.

Of the opposing country elevators, eight are located between the Illinois River and the Belt, two are south of the Belt, one is north of the river, and one is on the river and is not served by rail. The last-mentioned elevator buys corn from farmers as much as 18 miles south of the river or within 3 miles of the Belt. Although it has not been affected by the proposed rate, it recognizes the possibility of some loss in its south territory. The others, though served by rail lines other than the Belt, sell most of their "free" corn at the river, and consequently have been adversely affected by the proposed rate. Th majority have lost "free" corn business. Most seriously affected was one located at the same point as an elevator served by the Belt. Its business exceeded 250,000 bushels in each of the years 1955 and 1956, but it shipped only 71,000 bushels in 1957[*] and nothing in January 1958. The total decline in "free" corn business of all these country buyers, under 1956, was less than 25 percent. One of them shipped a portion of its 1957 business through an elevator on the Belt at a cost of over half of its usual commission on such sales. Another located midway between the Belt and the river, actually experienced a business increase, 1957 over 1956, with most of its corn going to the river. Its rail shipments declined from 258 carloads in 1956 to 78 carloads in 1957. Another believed that the proposed rate would be a temporary situation, and to retain its farmer customers it absorbed the difference, amounting to $1,800, between bids on corn in rail cars at competitive Belt elevators and bids in cars at its elevator.

The proposed rate has enabled the Belt elevators to outbid the middlemen seeking to purchase corn near the Belt area for river shipment. On January 30, 1958, the prices bid for corn per bushel were $1.09 in car at Minal, Ill., on the Belt, $1.04⅞ in car at Kernan, Ill., on another railroad, about 3 miles north of the Belt, and $1.075 in truck at the river. Since the Belt bid is f.o.b. freight car, an adjustment to eliminate the cost of elevation (averaging 2.5 cents per bushel) would place it 1 cent below the river bid at comparable stages in the transportation chain. There is little evidence that "free" corn moves by rail on other than the Belt line from stations between the Belt and the river. The Kernan bid less the cost of elevation would net the farmer $1.02⅜ in truck at Kernan. The river bid less the 2¾-cent truck rate to the river would net the farmer $1.04¼ in truck at Kernan.

[*] The effectiveness of the proposed rate was enjoined from August 28, 1957, to November 24, 1957.

The Farmers Grain Dealers Association of Illinois and the Illinois Grain Dealer's association, each of which has a membership of approximately 300 country elevators with facilities at about 400 rail stations in Illinois, ask for the restoration of the former competitive position among their members. It is their position that the rate from one station on one railroad must be competitive with the rate from another station on another railroad; that such rail rates should be competitive with other modes of transportation; and that such fourth-section relief as may be necessary should be granted to enable the railroads to compete with Illinois River barge lines.

Opposed to any fourth-section relief is the Indiana Farm Bureau Cooperative Association, a federated cooperative of about 93 associations with a total membership, mostly farmers, of about 180,000. It is a member of both the Board of Trade of the city of Chicago which opposes, and the Indianapolis Board of Trade, Inc., which supports, the application. It operates a 5.5 million bushel elevator on the New York Central at Indianapolis, Ind., and a 2.5 million bushel elevator in Louisville, Ky. It handles about 25 million bushels of corn annually, a large part of which is marketed in official territory. Among its 150 to 200 Indiana shipping points are stations intermediate from Kankakee to eastern destinations on the New York Central from which the rates on milled-in-transit corn to those destinations are as much as 10 cents higher than the proposed rates. Combination rates on corn via barge to Chicago thence by rail to these destinations are lower than the local rates from intermediate Indiana destinations and are applicable over Kankakee as well as Chicago. Shifting some of the Belt corn from barge to rail, which is the effect of the proposed rates, would not alter the present competitive relationship at eastern markets between it and Indiana corn.

In its study of the competitive situation, the New York Central made inquiries of corn processors at Kankakee, Paris, and Danville, Ill., and Indianapolis, Ind., as well as country elevators on the Belt. Three of the processors, General Foods Corporation at Kankakee, Illinois Cereal Mills at Paris, and Evans Milling Company at Indianapolis, support the proposed rate. Until the effectiveness of the proposed rate, the corn purchases of General Foods in the northern Illinois territory for rail delivery amounted to about 1.5 carloads a week. After the proposed rate became effective, it received 1,101 carloads during the first 8 months of 1957. In the same period, Illinois Cereal and Evans Milling received 327 and 219 carloads, respectively, from Belt origins. Immediately prior to 1957, Illinois Cereal received only two carloads in 3 years, and Evans Milling did not receive any cars in 15 years, from Belt origins. Of the 1,915 cars of corn originating on the Belt in the first 6 months of 1957,

1,226 cars, reflecting 70 percent of the total, were destined to Kankakee, Indianapolis, Paris, and Danville, and 548 to Chicago. Practically all, if not all, the 1,226 cars consisted of "free" corn on which the proposed rate would apply, while to Chicago, 31 cars were of "free" corn taking the proposed rate, and 517 were Commodity Credit Corporation corn to which the proposed rate would not apply. From the Belt origins to Chicago, the "free" corn movement aggregated 270 carloads in the 12-month period ended October 20, 1956, and 45 cars in the same period a year later.

According to General Foods Corporation, the proposed rate has enabled rail buyers to bid for corn in the country market in competition with river buyers, but a difference in the price which would be offered to the farmer still exists in favor of the river subterminal elevators. It computes differences of 9.93 and 0.63 cents a bushel before and after the effectiveness of the proposed rate, respectively. To determine the prices which could be offered to the farmer at the river elevator at Morris, Ill., and at the country elevator at Blair, Ill., it used a Chicago market price of $1.15 a bushel, from which it subtracted costs of 14.32 cents[4] a bushel on rail originations prior to the proposed rate, leaving $1.0068 a bushel as the amount which could be offered to the farmer at the country elevator; 5.67 cents[5] a bushel on rail originations since the effectiveness of the proposed rate leaving $1.0933 a bushel as the amount which could be offered to the farmer at the country elevator; and 5.04 cents[6] a bushel on river originations leaving $1.0996 a bushel as the amount which could be offered to the farmer at the river elevator.

Based on the actual daily bids at five Belt points and five river points during the 7-month period ended July 31, 1957, the Belt bids averaged 2.02 cents a bushel higher than the river bids. The belt bids, however, were f.o.b. rail car, after elevation; while the river bids were f.o.b. trucks, prior to elevation into barges. By adjusting the bids to a similar basis for comparison, the river bids are seen to be higher on the average than the rail bids.

The record indicates that the use of different moisture discount scales brings about different levels in bids, thus complicating the price picture and making it difficult to determine what the ultimate price paid will be under each scale. General Food's bids were on

[4] Reflects the proportional rail rate from Blair to Chicago of 20.5 cents and 3 percent tax converted to 11.32 cents a bushel plus country elevator handling of 2.5 cents a bushel.

[5] Reflects the proposed rate from Blair to Kankakee of 5.5 cents and 3 percent Federal tax converted to 3.17 cents a bushel, plus country elevator handling of 2.5 cents a bushel.

[6] Reflects the barge rate from Morris to Chicago of 4.4 cents and 3 percent Federal tax converted to 2.54 cents a bushel, plus elevation at river of 1.5 cents a bushel (2.69 cents per 100 pounds) and country elevator markup of .1 cent a bushel.

moisture discounts of 1 cent a bushel for each 0.5 percent of moisture ranging from 13.5 to 20 percent. There is testimony to the effect that these other scales are in use at Chicago and other markets, but there is no evidence that the river and Belt bids actually compared were on different scales so as to require any adjustment.

The cost of trucking from farm to river elevator on barge movements offsets the cost of trucking from farm to Belt elevator on rail movements. It is borne by the farmer in either case. If he were located equidistant from a river elevator and a Belt elevator, he could truck to either at equal cost. The same would hold true for a country elevator operator trucking corn which previously had moved from the farms to his elevator. The protestants contend that it costs more to truck corn from the farm to the river than to the Belt because river elevators are up to 40 miles from the farms and for-hire trucks are usually employed, while country elevators are generally within 8 miles of the farms, and farmer-owned transportation facilities are used. The logic of this contention is elusive. From the midway point the cost of getting the corn to the river or to the Belt would be the same whether the shipper, either the farmer or elevator operator, hired or furnished his transportation. From points north or south of the midway position, shippers would enjoy offsetting geographical advantages as to movement toward the river and the Belt, respectively.

Cargill Incorporated, Illinois Grain Corporation, and Glidden Company compare barge shipper costs of 18.5,[9] 17.7,[10] and 18 cents[11] per 100 pounds, respectively, with the proposed rate of 5.5 cents, and assert that these barge costs make no provision for insurance, shipper preference for country run unmixed corn, and the usual water-carrier disabilities such as weather conditions and added handling. This comparison is not valid in that barge-shipper costs are inflated, at least to the extent that they include cost of trucking to, and elevation at, the river. The more valid comparison is that of the bids, properly adjusted as previously herein described. The bids are predicated on the market price at Chicago, the purchaser's requirements, and

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[9] Includes trucking from Hiawatha, Ill., country elevator to Ottawa, Ill., river elevator of 5.36 cents, transfer truck to barge of 2.66 cents, barge rate Ottawa to Chicago of 4.95 cents, stevedoring at Chicago of 1.15 cents, transfer barge to rail at Chicago of 4.01 cents, and outbound inspection of 0.45 cent.

[10] Includes trucking from Dwight, Ill., country elevator to Morris, Ill., river elevator of 5.4 cents, transfer truck to barge of 2.7 cents, barge rate Morris to Chicago of 4.6 cents, and stevedoring and transfer barge to rail at Chicago of 5.2 cents.

[11] Includes nominal trucking from country elevator to Seneca, Ill., river elevator of 3 cents a bushel, transfer truck to barge of 1.5 cents a bushel, barge rate Seneca to Chicago of 3.63 cents a bushel, stevedoring at Chicago of 0.75 cent a bushel, and transfer barge to rail at Chicago of 2.52 cents a bushel, a total of 10.13 cents a bushel or 18 cents per 100 pounds.

the cost of transportation to Chicago from the points where the bid is made.

The Board of Trade of the city of Chicago, though contending that the proposed rate is too low, expresses doubt that an inbound rail proportional of 18 cents based upon the barge movement costs to the shipper as submitted by the river elevators, would enable applicants to meet the barge competition. Since price is a controlling factor in the shipper selection of the transportation mode, it believes that an equitable basis would be one predicated upon the pricing of the corn at the river elevator and on the Belt. Based upon the average difference of 2 cents a bushel in the rail corn bid on the Belt over the barge corn bid at the river and the trucking charges ranging from 2 to 4 cents a bushel from country elevators to river elevators, the proposed inbound proportional, according to the Chicago Board of Trade, would be lower than competitively necessary from Belt points in the 2, 2.5, 3, 3.5, and 4 cents a bushel trucking zones by amounts of 7, 8, 9, 10, and 10.5 cents per 100 pounds, respectively. By subtracting these amounts from the Belt bids, and trucking charges from the river bids, the Belt and river average bids for the 7-month period ended July 31, 1957, would be approximately the same, differing only from 0.02 to 0.2 cents a bushel. Increases, from 7 to 10.5 cents depending upon the trucking zone, would produce inbound proportional rates ranging from 12.5 to 16 cents. The 12.5-cent rate so adjusted would apply from Belt points nearest the river and most affected by barge competition, but most distant to Kankakee, and the 16-cent adjusted rate would apply from points most distant to the river and least affected by the competition, but nearest to Kankakee. Both the simple averages of 46.4 miles and weighted average distance of 38.3 miles based upon the corn movements on the Belt during the first 6 months of 1957, from the Belt points to Kankakee, are in the 3 cents a bushel trucking zone. The adjusted rate from Belt points in that zone would be 14.5 cents, and the Chicago Board of Trade is of the opinion that the Belt points should be blanketed with this rate because the points are so treated now, and the river prices at the most competitive river elevators, Spring Valley to Morris, are blanketed. This elaborate Chicago Board of Trade proposal is defective in that it begins with the erroneous premise that the Belt bids during the comparison period were higher than river bids, when, in fact, they were not, since they applied to corn at different levels in the transportation chain. Moreover, it contemplates a situation in which shippers by barge can favorably compete with shippers by rail at points on the Belt and permits the railroad to enjoy its geographical advantage only as to corn grown south of the Belt.

Applicants submitted no cost data, but rely on comparative earnings, rate levels, and operating conditions as indicative of the competitiveness of the proposed rate.

During the 9-month period ended August 31, 1957, the corn and corn products movement of the General Foods Corporation yielded average revenues of $60.07 per car, 110,078 pounds, and $1.065 per car-mile for 59.21 miles, from Belt origins to Kankakee; $403.23 per car, 61,775 pounds, and 47.7 cents per car-mile for 845.7 miles, from Kankakee to eastern destinations; and $440.43 per car and 50.9 cents per car-mile for 864.7 miles, from Belt origins to eastern destinations. In the same period, the movement of Evans Milling Company yielded average revenues of $39.42 per car, 109,197 pounds, and $2.36 per car-mile for 24.05 miles, from Belt origins to Kankakee; and $407.36 per car, and 61.62 cents per car-mile from Belt origins to eastern destinations, including Ohio via Kankakee and Indianapolis. The proposed rates did not apply to Ohio destinations during the period, and, excluding such shipments, the car-mile earnings averaged 51.09 cents. For 1955, the average revenues of the New York Central were 40.015 cents per car-mile for its average haul of 236.58 miles. Between 1948 and 1956, inclusive, the average railroad revenue from corn ranged from 73 to 95 cents per short line car-mile. On the products of agriculture, earnings ranged from 42 to 48 cents and on selected grain and grain products (including corn and corn products) 67 to 71 cents. Distances on which the study producing these figures was based were not shown. Actual distances would produce lower earnings, but in many instances actual mileages are close to short-line mileages.

The proposed combinations from Belt origins to 18 representative destinations via Kankakee, and the reshipping rates from Chicago to eastern destinations, reflect averages of 14.4 and 18.1 percent, respectively, of the docket 28300 first-class rates. On ex-lake grain, from Buffalo and Oswego, N.Y., and Erie, Pa., to tidewater ports, applicants maintain export proportional rates which range from 6.8 to 9.5 percent of the same first-class rates. Also, from certain Belt origins to New York City and Boston, Mass., applicants maintain export rates on grain which are lower than the combination of proportionals over Kankakee. For example, from Dwight, the combination domestic rates are 59.5 and 61.5 cents to New York City and Boston, respectively, and the export rate is 54.5 cents to both ports.

The operating distance of the New York Central from Chicago to Kankakee is 75 miles compared with the weighted average distance of 88.3 miles from Belt points to Kankakee. The aggregate distances from Belt to Kankakee via truck to the river, thence barge to Chicago, and thence the New York Central to Kankakee exceeded

by 185 to 797 percent the distance from Belt points to Kankakee, and to certain eastern destinations. The distances from Chicago via Kankakee exceeded by 3.73 to 20.61 percent the distances from Belt points via Kankakee. The line of another carrier, the Illinois Central Railroad Company, from Chicago to Kankakee is more direct than that of the New York Central. The proposed rates apply from Belt points to eastern destinations via either Kankakee or Chicago.

The switching of loaded and empty grain cars from and to terminal elevators at Chicago for the transportation of corn to Kankakee, Indianapolis, Paris, and Danville by the New York Central is more complex than its handling of cars at Belt origins for movement to the same destinations. Switching charges absorbed by the New York Central on corn from Chicago to Kankakee during 9 months in 1956 averaged about 9 cents per 100 pounds. Avoidance of this cost item and the shorter weighted average distance from Belt points as compared to the distance from Chicago to Kankakee support the New York Central's contention that handling corn from the Belt points is less expensive than from Chicago. Further support lies in the fact that no additional trains or power units were needed to handle the increased corn traffic from the Belt points, since the regular trains drop off the empties when westbound and pick up the loaded cars when eastbound. The exact extent to which handling is less expensive on the Belt than at Chicago is not shown.

The New York Central, for its haul from Chicago to Kankakee, assesses the local rate, but upon transit it is credited to the Chicago reshipping rate applicable via Kankakee, out of which it was required to absorb switching charges. At the proposed rate, it receives after transit the full amount of the proposed inbound proportional rate of 5.5 cents for its haul from Belt origins to Kankakee, and avoids the Chicago switching absorption. Thus by handling traffic at the proposed rate, its revenues are increased by 7.5 cents per 100 pounds over its previous handling, and its expenses are reduced in accordance with the reduction in miles from the 75 between Chicago and Kankakee to the lesser weighted average distance of 38.3 miles from Belt points to Kankakee.

The protestants submitted a study of the system average costs [12] of the New York Central and the territorial average costs [13] of the eastern district railroads. On the average 55-ton load, the out-of-pocket costs of the New York Central and the eastern district rail-

[12] Based upon an application of cost formula Rail Form A of the Commission's section of cost finding.

[13] From our cost finding section statement No. 1-57 applying Rail Form A to expenses of the eastern district railroads, adjusted to reflect current levels.

roads are 8.50 and 8.57 cents per 100 pounds, respectively, for the weighted average distance of 98.3 miles. On minimum loads of 50 tons and for the simple average distance of 46.4 miles, the out-of-pocket costs range up to 8.60 cents per 100 pounds.

This study is intended to show that the proposed proportional rates to Kankakee are noncompensatory. It fails in this purpose, primarily because it deals only with the inbound proportional. That rate factor has no independent existence, but is an integral part of the rate which applies on the through transportation from Belt origin, through the milling-in-transit point, to delivery of the corn product at its ultimate destination. Moreover, it is only by application of the through combination that the fourth-section departures subject of this proceeding are created.

Applicants point out that, since rates from each origin to each ultimate destination could be filed as single factor rates (and be no more compensatory than under the present publication), condemnation based on finding the inbound proportional only to be noncompensatory would be tantamount to condemnation arising out of the method of publication.

The authorities cited by the protestants in support of their contention that the issue here concerns a separate component of through rates for the future the lawfulness of which may be passed on independently of the other components, are not helpful here. *Great Northern Ry. Co.* v. *Sullivan*, 294 *U.S.* 458, was a section 1 case holding that the through rate must be shown to be unreasonable in order to support a reparation award. *Atchison, T. & S.F. Ry. Co.* v. *United States*, 279 U.S. 768, condemned a railroad's attempt to increase a local rate to a transit point after the traffic was shipped out of that point by another railroad. *Cairo Board of Trade* v. *Cleveland, C., C. & St. L. Ry. Co.*, 46 I.C.C. 343, so far as is pertinent, concerned a grain rail center which was unduly prejudiced by the failure of the railroads to accord it reshipping rates comparable to those enjoyed by competitive rail centers. Somewhat similar thereto is *Atlantic Terra Cotta Co.* v. *Atlanta & W.P.R. Co.*, 151 I.C.C. 45.

For 1956, Mechling's operating ratio was 91.9 percent, and its average fully distributed costs for the transportation of corn from the six most competitive ports to Chicago were 11.4 mills and 87.93 cents per ton or 4.4 cents per 100 pounds. These expenses are about 10 cents less than the New York Central's average fully distributed costs of 14.33 and 13.57 per 100 pounds on 50-ton and 55-ton loads, respectively, for 46.4 miles, computed by protestants. According to Mechling, this difference of approximately 10 cents represents its inherent low cost advantage which must be preserved. The barge carrier is not entitled under the act to have its rates protected from

a competing mode of transportation, where, as in this instance, the railroad's efforts to secure traffic do not amount to a destructive competitive practice.

The Chicago Board of Trade and others raise certain issues, principally discrimination against whole corn by the milling-in-transit limitation; discrimination against Chicago by the proposed rate combination applying over Kankakee when prior thereto rates to the East were made over Chicago; undue preference to the processors of corn by the limitations in the application of the proposed rate to commodities shipped by these processors; and unreasonable routes on the proposed rate combination by the restrictive routes which apply over Kankakee in movements to eastern destinations. Although the New York Central intends to remove the milling-in-transit limitation, these issues do not directly deal with the fourth-section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings. However, since the proposed rates are effective over Chicago, that point has the same stature as all other corn-processing points in official territory in their application. Moreover, the routes over Kankakee are the same as they were for many years prior to the establishment of the proposed rates, and, while limited in their scope as compared to making the inbound rate break on Chicago, there is no indication of undue damage to Chicago.

It is clear that the competitive situation which prevailed prior to the proposed rate between the all-rail and the barge-rail rates on corn from the northern Illinois territory to the East required an adjustment in the all-rail rates, and that such an adjustment requires fourth-section relief. The proposed rates are intended partly to remedy the situation, and the instant application seeks the relief to cover the departures which occur. Before such relief may be granted, applicants must show that the proposed rates are reasonably compensory and no lower than necessary to meet the competition.

The country elevators in the area were originally set up to do business over all-rail routes, and yet, prior to the proposed rate, the preponderant portion of their business was over barge-rail routes. Except for the handling of Government-controlled corn shipped at export rates (which are lower than those in issue), these elevators were relegated, for the most part, to such operation as was necessary to process corn for retail locally, while the elevator operators took on the function of merchandisers employed at taking the corn off the farmers' hands and marketing it at the river. After the proposed rate went into effect, this pattern was changed. Elevators on the Belt discontinued their merchandising business with the subterminal river elevators and returned to their former role as rail elevators.

Of the elevators closer to the Belt than to the river, but which had no facilities on the New York Central, some set up portable equipment on the Belt, while others experienced reductions and face possible elimination of their business in corn for river shipment. This is to be expected in making the all-rail route competitive with the barge-rail route.

Some diversion of traffic must necessarily result in redeveloping a rail movement of corn from the area contiguous to the rail line, and to that extent the barge movement and the business of those connected therewith will be adversely affected. An example of how the competitive situation was altered is seen in the case of the country elevator at Grand Ridge, Ill., which lost some business from farms located between it and the Belt elevator at Streator, 8 miles to the south, but lost no business from farms lying between it and the river elevator at Ottawa, 9 miles to the north. Another country elevator operator at Marseilles, Ill., north of the river, felt no adverse effects from the operation of the proposed rates, notwithstanding that his area of business extends south of the river to within 6 miles of the Belt. Even though he lost some customers, he gained others. It is interesting to note that though this operator was located on a line of the Chicago, Rock Island and Pacific Railroad Company, he had no facilities for rail loading because, as he related, there is no incentive to ship by rail, the river rate being what it is.

At the same time the 10 competitive river ports, notwithstanding their loss of traffic to the Belt, increased their shipments of corn to Chicago from 402,105 tons in the period December 15, 1955, to August 30, 1956, to 493,692 tons in the corresponding period the following year during which time the proposed rates were in effect. It is apparent that while corn grown adjacent to the Belt was attracted to the rails, that grown adjacent to the river remained with the barges. Thus, it is evident that the proposed rates are not lower than necessary to meet the barge competition.

The rate and revenue comparisons and cost-saving evidence submitted by the New York Central and its supporters establish the compensativeness of the proposed rates.

We find, upon the record herein, that applicants have shown a special case within the meaning of section 4 of the act, by virtue of actual and compelling competition; that the proposed rates are not lower than necessary to meet that competition, do not constitute a destructive competitive practice, are reasonably compensatory, and will not impose an undue burden on other traffic; and that the relief sought would not be disharmonious with the other provisions of the act, would be in the public interest, and is justified.

A fourth-section order granting the relief sought will be entered.

310 I.C.C.

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APPENDIX D

Fourth Section Order No. 19346

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D.C., on the 8th day of June, A.D. 1960.

CORN AND CORN PRODUCTS, ILLINOIS TO OFFICIAL TERRITORY

By fourth-section application No. 33955, as amended, carriers parties to the New York Central Railroad Company tariff I.C.C. No. 1169 and Agent H. R. Hinsch's tariff I.C.C. Nos. 4403 and 4499, according as they may participate in the traffic, apply for authority to continue or to establish and maintain the rates hereinafter described without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act. A hearing having been held, and full investigation of the matters and things involved in said application having been made, and the division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which application and report are hereby referred to and made a part hereof:

It is ordered, That applicants in No. 33955, as amended, be, and they are hereby, authorized to continue or to establish and maintain over their proposed direct routes, for the transportation of corn products, in carloads, as more fully described in the application, from points in Illinois on that part of the New York Central Railroad Company's Kankakee Belt Line extending from Van's Siding to Moronts, both inclusive, to points in central, trunk-line, and New England territories, rates constructed on the basis de-

scribed in the application, and to maintain higher rates from and to intermediate points; *Provided*, That the rates from and to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

It is further ordered, That all other and further relief prayed by fourth-section application No. 33955, as amended, be, and it is hereby, denied.

The commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act.

By the Commission, division 2.

HAROLD D. McCOY,
Secretary.

(SEAL)

APPENDIX E.

INTERSTATE COMMERCE ACT, 24 Stat. 379, as amended [49 U.S.C. § 1 *et seq.*]:

National Transportation Policy [49 U.S.C. preceeding § 1]:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 3(1) [49 U.S.C. § 3(1)]:

> (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect what-

soever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 4(1) [49 U.S.C. § 4(1)]:

(1) It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: . . .

Section 13(1) [49 U.S.C. § 13(1)]:

(1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

APPENDIX F

Representative decisions of the Commission reflecting its historical position that it will not authorize the establishment and maintenance of rates which do not conform to the requirements of section 4 of the Act, if such rates would violate other sections of the Act, particularly sections 2 and 3, are as follows:

> The test which the Commission must now apply to determine whether the carrier may be given the advantage of an exception to the general rule of section four is the same test that it may apply with respect to any other discrimination or inequality. There is incorporated in section four every standard set up by Congress as a guide to this Commission which is to be found in any section of the act. And the leeway or discretion which may properly be exercised by this Commission under any other section may properly be exercised under this section. For instance, it is for us, acting within the limitations of the law, to determine what is a reasonable practice for a common carrier to pursue. This calls for the widest exercise of discretion. And if our judgment is arbitrary, or we transcend those limitations properly binding such a tribunal, our act may be set aside. • • •
>
> The Commission has not been left without a proper test to apply: The test of justness, of reasonableness, of discrimination, of preference and advantage; the test of fair play as between communities. With this construction of the statute, which is historically supported, as well as by those more or less variable measures known as the canons of statutory construction, the statute becomes both practicable and constitutional; we are neither forced to disregard it as a whole nor to eliminate any of its provisions; it does not become an absolute long-and-short-haul section, because the proviso permitting of exceptions remains; the provi-

sional clause does not relegate the entire section to the limbo of unconstitutionality, because we find that it may be administered in thorough harmony with the whole act, part of which it is; and the tests and standards to be applied are not matters of fancy, but are the express and positive words in the law itself. In short, Congress has undertaken to specify distinctly one practice which it wishes especially to destroy and charges this Commission not to permit it to obtain unless such discrimination, such preference, such practice may be shown not to be a discrimination that is unjust, a preference that is undue, or a practice that is unreasonable, because of peculiar facts and conditions. *Railroad Commission of Nevada* v. *S. P. Co.*, 21 I.C.C. 329, 338-339.

* * *

To paraphrase the language of the Supreme Court, in the exercise of a sound legal discretion we may grant permission to charge higher rates at the intermediate points upon the ground that such rates are part of an established group adjustment, if we are satisfied that this is compatible "with a due consideration of the private and public interests concerned and in view of the preference and discrimination clauses of the second and third section," and, no doubt, of the provisions of the first section also. *Commodity Rates On Lumber and Other Forest Products, In Carloads, From South Pacific Coast Territory To Points In Central Freight Association Territory*, 165 I.C.C. 561, 569.

* * *

It is well settled that we will not authorize fourth-section relief where the proposed rate structure would create infractions of other provisions of the act. Thus, where any doubt appears, the burden is upon applicants to show that the proposed rate structure would not result in any unlawful situations. *Bituminous Coal To Buffalo, N. Y.*, 219 I.C.C. 554, 560.

* * *

It is well settled that sections 3 and 4 should be so construed as to cause them to operate harmoniously. *Differential Routes To Central Territory*, 211 I.C.C. 403, 421.

* * *

Water competition has long been recognized as creating a special case in which relief may be granted from the provisions of section 4. *Intermountain Rate Cases*, 234 U.S. 476. However, the relief from that section cannot be granted to establish rates that may be in violation of other sections of the act. *Pig Iron To Butler, Pa.*, 222 I.C.C. 1, 2.

* * *

Our authority to grant relief from the provisions of section 4 is limited to "special cases." A special case which might justify fourth-section departures upon grounds of market or other competitive conditions, contemplates that such departures will not result in violations of other provisions of the act, particularly section 3. On this record, we conclude that applicants have failed to sustain the burden which rests upon them to prove that the proposed rates would not create infractions of provisions of the act other than section 4. In the circumstances, we find that sufficient justification has not been shown to warrant the approval of the relief sought. Accordingly, the application will be denied. An appropriate order will be entered. *Iron and Steel To Minnesota*, 231 I.C.C. 425, 428.

* * *

The record contains uncontradicted evidence submitted on behalf of the Chicago intervener that the reduction of the rates from Janesville to Evanston, and not to points in the Chicago district, would unduly prefer the Evanston dealer and unduly prejudice Chicago dealers in competing for business both in Evanston and in the Chicago district.

We find that sufficient justification for the relief prayed by this application No. 17453 has not been

presented, and accordingly it will be denied. *Sand and Gravel to Northfield and Evanston, Ill.*, 234 I.C.C. 65, 68.

* * *

In the administration of section 4 of the act, the Commission has adopted the view that relief from the provisions thereof should be granted where necessary to enable a carrier to retain or secure traffic which otherwise would move over another route, provided the rates established for that purpose do not conflict with other provisions of the act, and are not contrary to the public interest. *Coal and Coal Briquets in the South*, 289 I.C.C. 341, 376-377.

* * *

It goes without saying that carriers should not propose rates or rate structures for approval in a fourth-section application which create infractions of other provisions of the interstate commerce act, and particularly of section 3. *Transcontinental Cases of 1922*, 74 I.C.C. 48, 71.

* * *

When fourth-section relief is granted it should be compatible with the affected interests and with the provisions of the Interstate Commerce Act. *Passenger Fares, Hell Gate Bridge Route, New York, N. Y.*, 296 I.C.C. 147, 153.

* * *

The protestant meets the same competition at Lake Charles that is encountered by the grinders at Houston and Corpus Christi. The evidence is convincing that the proposed rate would result in undue prejudice to the protestant and in undue preference of shippers and receivers under the proposed rate.

In view of the conclusion reached with respect to the proposed schedules, a further discussion of the fourth-section application is unnecessary. *Crude Barytes Ore from Missouri to Corpus Christi and Houston*, 299 I.C.C. 505, 508.

* * *

It is clear that the suspended rates would result in violations of section 3 of the act. In their brief, the western trunk-line respondents suggest that such situations should be handled in separate proceedings. Ordinarily, adjustments which invite further controversy must be viewed with disfavor.

We find that the proposed rates have not been shown to be just and reasonable, and that they would result in violations of section 3 of the act. An order will be entered requiring their cancellation and discontinuing the proceedings. The fourth-section applications will be denied. *Iron and Steel from Minnequa to Kansas, Nebraska, and South Dakota*, 278 I.C.C. 163, 168-169.

* * *

The rail carriers have the right to meet competition in whatever form it may arise, provided that the rates do not contravene any provision of the act, and we may, subject to certain conditions, grant relief from the operation of the long-and-short-haul provision of section 4 of the act with respect to such rates. The first part of section 4(1) of the act is devoted to expressing the general prohibition against charging more for a shorter than for a longer haul over the same line or route, the shorter being included in the longer distance, and also against charging greater compensation as a through rate than the aggregate of intermediate rates. However, as indicated, it is within our power to relieve the carriers from the operation of this general prohibition, upon application by them and investigation of the matter by us, but only in special cases and only after finding that the charge to the more distant point is reasonably compensatory for the service performed.

The first question to be resolved is whether the situation presented falls within the category of a special case. Competition has always been the principal "special case" which we have recognized in granting relief.

Although this be true, the existence of competition does not *ipso facto* entitle an applicant to relief. The competition relied upon must always be examined in relation to the existing circumstances, bearing in mind that we cannot grant relief from the long-and-short-haul provision to establish rates that may be in violation of other sections of the act, in particular sections 2 and 3. See *Intermountain Rate Cases*, 234 U. S. 476. *Nepheline Syenite from Ontario, Canada, to the East*, 308 I.C.C. 561, 564-565.